Funk David Paul v Asia General Asset Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–616–03 OF 2012
RAMLY ALI, LIM YEE LAN AND DAVID WONG JJCA
4 SEPTEMBER 2013

Labour Law — Employment — Remuneration — Appeal to Court of Appeal — Claim for entitlement to retirement gratuity — Whether eligible — Allegation that employer had paid as employer contributions pursuant to employment provident fund — Whether retirement gratuity came within word 'remuneration' — Interpretation of 'remuneration' — Employment Provident Fund Act 1991 s 47(1)

The appellant started employment with The Asia Life Assurance Society Ltd in 1987 as a branch manager in Kota Kinabalu. In 1992, he was transferred to The Asia Insurance Co Ltd without any loss of benefits or seniority. The appellant was offered continuous employment with the respondent without any loss in seniority or benefits and moved one last time before he eventually retired when the respondent merged with Tokio Marine Insurance (M) Bhd ('TMI') in 2007. When the appellant contacted the respondent to find out about his retirement gratuity entitlement, he was informed that his gratuity eligibility was negative. It was further explained to the appellant that although he was entitled to a retirement gratuity of RM141,000, the amount that the respondent had paid as employer contributions pursuant to the EPF was RM148,297 and therefore, his retirement gratuity for 20 years of loyal service to the respondent was RM7,297. The appellant retired at the age of 55 and unhappy with the retirement he received, proceeded to claim for the sum of RM141,000 being his retirement gratuity which was allegedly unlawfully deducted by the respondent. The claim was dismissed by the High Court and hence, the present appeal. The crucial issue was whether the appellant's retirement gratuity comes within the word remuneration.

Held, allowing the appeal with costs:

(1) Section 47(1) of the Employment Provident Fund Act 1991 ('the Act') contains the two words in question and applying the trite principle of construction that the Parliament does not use words in legislation in vain, it must be the intention of the Parliament that the words 'wages' and 'remuneration' have different meanings. Further, if they are one and the same, the Parliament could have easily left the word 'remuneration' out of s 47(1) of the Act (see para 11).

(2) As the term 'remuneration' was not expressly defined, the court must employ settled principles of interpretation in affixing a definition to it.

The Act is a piece of social legislation and hence a liberal or purposive interpretation should be given to it. The term 'remuneration' must be affixed with a meaning with a wider connotation. Wages is a term referring to payments for service or works rendered on a regular basis; hence there are terms or saying 'my weekly or monthly wages' in ordinary parlance. This meaning would explain the exclusion of (a) service charge (b) overtime payment (c) gratuity or (d) retirement benefit from the definition of 'wages' in s 2 of the Act. Wages is but one species of remuneration (see paras 12 & 13).

(3) The word remuneration thus, included the appellant's retirement gratuity. The word 'remuneration' was defined in *Oxford Dictionary* as 'payment for services rendered'. 'Payment for services' could and must include 'retirement gratuity' (see para 14).

[Bahasa Malaysia summary

Perayu mula bekerja dengan The Asia Life Assurance Society Ltd pada tahun 1987 sebagai pengurus cawangan di Kota Kinabalu. Pada tahun 1992, dia dipindahkan ke The Asia Insurance Co Ltd tanpa apa-apa kerugian faedah atau kekananannya. Perayu ditawarkan pekerjaan berterusan dengan responden tanpa apa-apa kehilangan dalam kekananannya atau faedah dan berpindah untuk akhir sekali sebelum dia akhirnya bersara apabila responden bergabung dengan Tokio Marine Insurance (M) Bhd ('TMI') pada tahun 2007. Apabila perayu berhubung dengan responden untuk mengetahui mengenai hak ganjaran persaraannya, dia diberitahu bahawa kelayakan untuk ganjarannya adalah negatif. Ia selanjutnya dijelaskan kepada perayu bahawa walaupun dia berhak kepada ganjaran persaraan berjumlah RM141,000, jumlah yang responden di bayar sebagai sumbangan majikan berikutan KWSP adalah RM148,297 dan oleh itu, ganjaran persaraannya untuk 20 tahun khidmat setia kepada responden adalah RM7,297. Perayu bersara pada umur 55 dan tidak puas hati dengan persaraan yang diterimanya, meneruskan dengan menuntut untuk sejumlah RM141,000 sebagai ganjaran persaraan yang didakwa dipotong secara tak sah oleh responden. Tuntutan tersebut ditolak oleh Mahkamah Tinggi dan maka, rayuan ini. Isu penting adalah sama ada ganjaran persaraan perayu terangkum dalam maksud perkataan ganjaran.

Diputuskan, membenarkan rayuan dengan kos:

(1) Seksyen 47(1) Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta') mengandungi dua perkataan yang dipersoalkan dan mengguna pakai prinsip nyata pembentukan bahawa Parlimen tidak menggunakan perkataan-perkataan perundangan dengan sia-sia, ia mestilah niat Parlimen bahawa perkataan-perkataan 'wages' dan 'remuneration' mempunyai maksud berlainan. Selanjutnya, jika ia adalah satu dan sama, Parlimen boleh membiarkan perkataan 'remuneration' keluar daripada s 47(1) Akta (lihat perenggan 11).

(2) Memandangkan terma 'remuneration' tidak ditakrifkan secara nyata, mahkamah mesti menggunakan prinsi-prinsip nyata tafsiran dalam melekatkan definisi kepadanya. Akta adalah satu perundangan sosial dan maka tafsiran liberal atau maksud patut diberikan kepadanya. Terma 'remuneration' mesti dilekatkan dengan maksud dengan konotasi yang lebih luas. Gaji adalah terma yang merujuk kepada bayaran-bayaran untuk khidmat atau kerja yang diberikan atas dasar kebiasaan; maka terdapat terma atau pernyataan 'my weekly or monthly wages' dalam dalam bahasa biasa. Maksud ini akan menjelaskan pengecualian (a) caj khidmat (b) bayaran lebih masa (c) ganjaran atau (d) faedah persaraan daripada definisi 'wages' dalam s 2 Akta. Gaji adalah salah satu jenis ganjaran (lihat perenggan 12 & 13).

(3) Perkataan ganjaran oleh itu, termasuk ganjaran persaraan perayu. Perkataan 'remuneration' didefinisikan di dalam *Oxford Dictionary* sebagai 'payment for services rendered'. 'Payment for services' boleh dan semestinya memasukkan 'retirement gratuity' (lihat perenggan 14).]

Notes

For cases on remuneration, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1301–1311.

Cases referred to

Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal [2009] 5 MLJ 322; [2009] 5 CLJ 605, FC (distd)

Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor [2001] 3 MLJ 705; [2001] 3 CLJ 547, FC (folld)

Legislation referred to

Employment Provident Fund Act 1991 ss 2, 47(1)

Fahri Azzat (Aisya Abdul Rahman with him) (Azzat & Izzat) for the appellant.
Wong Hok Mun (Azim, Tunku Farik & Wong) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of High Court in which the learned judge dismissed a claim by appellants, Mr David Paul Funk ('David') and Ms Kok Lai Ying ('Lai Ying'), for their retirement gratuity, allegedly unlawfully deducted by the respondent.

[2] We heard the appeal on 29 July 2013 and after giving due consideration

to respective submissions we allowed the appeal and now give our reasons.

BACKGROUND FACTS

[3] As the facts set out by learned counsel for the appellant are in our view accurate and not seriously challenged by learned counsel for the respondent, we adopt the same with some appropriate amendments.

David's case

[4] David started worked with The Asia Life Assurance Society Ltd, on 17 February 1987 as a branch manager in Kota Kinabalu and was confirmed on 11 September 1987.

(a) On 28 January 1992, he was transferred to The Asia Insurance Co Ltd ('TAICL') the predecessor to the respondent, which took effect on 1 January 1992 without any loss of benefits or seniority.

(b) On 27 July 1993, he was given the *Handbook on Terms and Conditions of Employment for Executive Staff* ('the Handbook').

(i) cl 19 of the Handbook relates to *Retirement Gratuity* and states as follows:

> Subject to any executive having served not less than five years continuous service, the Company shall make a lump sum payment hereinafter referred to as retirement in accordance with the following provisions:…

(ii) cll 19.1–19.8 of the Handbook deal with the entitlement to the retirement gratuity in a variety of situations ie upon retirement of age (cl 19.1) or on account of incapacity to work (cl 19.2), or upon retrenchment (cl 19.5).

(iii) the proviso of cl 19 of the Handbook, which is where the crux of this appeal lies, reads as follows:

> Retirement benefit shall be calculated on the basis of 1 1/4 months of last drawn salary for every completed year of service *less the Company's contribution to any form of provident fund including E.P.F* or any form of Government sponsored or administered superannuation scheme, or pension covering retirement or death benefit.

(c) Sometime about 24 November 1998, in compliance with the requirement to being a locally incorporated company AICL was taken over by Asia Insurance (M) Bhd, as the respondent was known then. On 1 January 1999, David was offered continuous employment with the

respondent without any loss in seniority or benefits. The respondent changed to its present name on 3 September 2007.

(d) David moved one last time before he eventually retired when the respondent merged with Tokio Marine Insurance (M) Bhd ('TMI') in July 2007. He was again offered continuous employment with TMI without any loss of seniority or benefits. He is not pursuing his case against TMI after his claim against them was dismissed in the High Court.

(e) Soon after his move to TMI, David called Lee Chai Long of the respondent to find out about his retirement gratuity entitlement. He was told that *'Gratuity eligibility is negative. We will be faxing the schedule of the gratuity amount less EPF contributions by the company for your reference*'.

(f) It was explained to David that although he was entitled to a retirement gratuity of RM141,000, the amount that the respondent had paid as employer contributions pursuant to the EPF was RM148,297. Therefore applying the cl 19 proviso, his retirement gratuity for 20 years of loyal service to the respondent was — RM7,297.

(g) David retired on 2 June 2008 after he reached the age of 55. Unhappy with the retirement he received on 26 July 2010 he instructed his lawyers to demand the respondent pay the sum of RM141,000 being his retirement gratuity.

Lai Ying's case

[5] Lai Ying's case may differ on the details of her employment but the thrust of her complaint is the same. She too is unhappy with the deductions made to her retirement gratuity entitlement by the respondent.

(a) Lai Ying joined The Asia Insurance Co Ltd (TAICL) on 1 May 1971. On 1 January 1999 she moved over to the defendant. While at TAICL, she too was given the Handbook.

(b) She retired as an executive officer for the Kuantan branch office on 31 May 2007.

(c) Upon her retirement she made inquiries about her retirement gratuity entitlement and was told that even though she was entitled to RM181,000, after the application of the cl 19 proviso, she was entitled only to an amount of RM73,097 after a deduction of RM 108,803 was taken into account.

(d) Dissatisfied with the deductions made, on 13 July 2010, she instructed her lawyers to issue a letter of demand against the respondent for the amount deducted.

HIGH COURT DECISION

[6] As pointed out by respective counsel, this matter concerns the legal issue of whether cl 19 of the Handbook which allows deduction of EPF contributions by the respondent in calculating the retirement gratuity contravenes s 47(1) of the Employment Provident Fund Act 1997 ('EPF Act') which reads as follows:

> (1) Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct or otherwise recover from the wages or remuneration of the employee, the employer's contribution, from the employee.

[7] The learned judge held that cl 19 did not contravene s 47(1) of the EPF Act on the ground that retirement gratuity do not come within the definition and meaning of 'wages' and 'remuneration' in s 2 of the EPF Act. This is what the learned judge said:

> It is clear to me therefore that wages and remuneration are only paid to an employee during the tenure of his employment whereas retirement benefit is only paid upon retirement. They are therefore separate distinct and unmistakably different

OUR GROUNDS OF DECISION

[8] The starting point of our deliberation is the definition of 'wages' as found in the EPF Act which reads as follows:

'Wages' means:

(1) all remuneration in money

(2) due to an employee under his:

  (a) contract of service; or

  (b) apprenticeship

(3) whether agreed to be paid:

  (a) monthly,

  (b) weekly, or

  (c) daily, or

  (d) otherwise

(4) and includes any:
  (a) bonus,
  (b) commission, or
  (c) allowance
(5) whether or not it is payable under his:
  (a) contract of service,
  (b) apprenticeship, or
  (c) otherwise
(6) but does not include:
  (a) service charge;
  (b) overtime payment;
  (c) gratuity
  (d) retirement benefit

[9] From that definition, it is crystal clear that 'wages' as statutorily defined do not include gratuity and retirement benefit. The crucial issue which confronts us is whether the appellants' 'retirement gratuity' comes within the word 'remuneration'.

[10] Learned counsel for the respondent submits that the appellant's retirement gratuity does not come within the meaning of the word 'remuneration'. His reasons can be seen in his submission and for clarity, we reproduce the relevant part of his submission:

Remuneration is not defined

6.2. With respect, the appellants' argument that *'remuneration'* is not defined in the EPF Act is wrong. *'Remuneration'* is defined in s 2 of the EPF Act, *see: paragraph 5.5 above.*

6.3. The legislature has used the word *'remuneration'* to define 'wages' to the effect that 'wages' include all *remuneration* in money. Therefore if retirement benefits are not part of wages, it must also follow that retirement benefits are also not part of remuneration. Any other conclusion would be perverse.

6.4. The above inescapable conclusion is fortified by one of, if not the most important, pillars of statutory interpretation. It is this, and I quote from *Halsbury's Laws of England*, Volume 44 at paragraph 861 at [TAB-B]:

> 'It may be presumed that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the Legislature is deemed not to waste its words or say anything in vain.'

6.5. Therefore, the Legislature used the word 'remuneration' in the definition of 'wages' for a purpose and not as mere surplusage; that is to define 'wages' to include all remuneration in money.

6.6. My contention above is fortified by the general rule that a word must be considered as used throughout a statute *in the same sense*, see the House of Lords decision in *Farrel v Alexander* [1977] AC 59 at page 85 at [TAB-C]. For the converse to apply, it must be the exception rather than the rule. Therefore, the presumption ought to be that Parliament intended the word remuneration to have the same meaning in both s 2 and s 47(1) of the EPF Act. In this particular case, there is nothing to suggest that the situation is exceptional rather than the norm. In fact, the EPF Act construed as a whole strongly suggests that the normal rule ought to apply.

6.7. This brings me on to my second argument. If one were to read both s 2 and s 47(1) of the EPF Act together, it is apparent from:

(i) s 47(1) that the legislature intended to protect employees from having the employer's contribution deducted from their pay (wages & remuneration); but

(ii) s 2 that the legislature created an exception in regards to retirement benefits. Presumably, this is because retirement benefits are extras over and above an employee's pay as well as his savings in his EPF account.

6.8. Let us presume now that the appellants' argument was to prevail. This would mean that no deductions may be made from the retirement benefits as it remains a specie of remuneration. Would this not drive the proverbial cart and horses through the s 2 definition of 'wages' and defeat Parliament's intention of excluding retirement benefits from an employee's pay? Why expressly exclude retirement benefits from the definition of 'wages' on the one hand and on the other hand include it as part of remuneration'. This would defeat the whole purpose of s 2 of the EPF Act and render redundant the express exclusion of retirement benefits from the definition of wages.

[11] With respect, we are unable to agree with learned counsel for respondent and our reasons are these. We cannot ignore the fact that s 47(1) contains the two words in question and applying the trite principle of construction that parliament does not use words in legislation in vain, we find that it must be the intention of parliament that the words 'wages' and 'remuneration' have different meanings. Further we say that if they are one and the same, parliament could have easily left the word 'remuneration' out of s 47(1).

[12] As the term 'remuneration' is not expressly defined, the court must employ settled principles of interpretation in affixing a definition to it. Respective counsel had agreed that EPF Act is a piece of social legislation and

hence a liberal or purposive interpretation should be given to it. What that means is succinctly set out in the judgment of Steve Shim CJ (Sabah and Sarawak) in *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 MLJ 705; [2001] 3 CLJ 547:

> In construing a statute, the intention of Parliament must not only be deducted from the language used but also from the social and economic conditions which give rise to it and the mischief it was meant to remedy (see *Re Application By Dunlop Estate Bhd* [1980] 1 MLJ 243; *Seafood Court Estates v Asher* [1949] 2 All ER 155 , 164). It is well settled in the area of law governing statutory interpretation and construction that each legislation must be construed in its own light. In enacting legislation, Parliament is invariably prompted by considerations and demands peculiar to the circumstances for which enactment is made. To determine the legislative intent, each statute must be examined on its own against the background in which it was passed. We would adopt the observations of MohdAzmi J (as he then was) in *Dunlop Estate Bhd v All Malaysia Estates Staff Union* [1980] 1 MLJ 243 who said, inter alia:
>
> > 'In my view, having regard to the principles enunciated in the cases cited, the Industrial Relations Act, being a social legislation enacted with the prime object of attaining social justice and industrial peace, demands practical and realistic interpretation whenever necessary for the purpose of maintaining good relationship and fair dealings between employers and workers and their trade union and the settlement of any differences of dispute arising from their relationship.
> >
> > Quite clearly, the Industrial Relations Act is a piece of social legislation whose primary aim is to promote social justice, industrial peace and harmony in the country. As such, the approach to interpretation must be liberal in order to achieve the object aimed at by Parliament. This had been best described by Lord Diplock as 'the purposive approach', an approach followed by Lord Denning in *Nathan v Barnet London Borough Council* [1978] 1 WLR 220 who reiterated in all cases involving the interpretation of statutes, we should adopt a construction that would promote the general legislative purpose underlying the provision. We accept that to be the correct approach'.

[13] Applying the above principles, we are of the considered view that the term 'remuneration' must be affixed with a meaning with a wider connotation. Wages in our view is a term referring to payments for service or works rendered on a regular basis; hence we have the terms or saying 'my weekly or monthly wages' in ordinary parlance. This meaning would explain the exclusion of (a) service charge (b) overtime payment (c) gratuity or (d) retirement benefit from the definition of 'wages' in s 2 wages is but one species of remuneration.

[14] The word remuneration thus in our view includes the appellants' 'retirement gratuity'. As pointed out by learned counsel for the appellants, the word 'remuneration' is defined in *Oxford Dictionary* as 'payment for services rendered'. 'Payment for services' can and must include 'retirement gratuity'.

[15] In any event, to hold otherwise would contravene the express intention of protecting the welfare of the employees in this country. The contributions of EPF by employers is a creature of statute and parliament with the sole purpose of benefiting employees and any interpretation of s 47(1) must be done with that purpose at the foremost of our minds. Further those contributions in law belong to the employees and not that of the employer. As such no employer in the country should employ any means direct or indirect to dilute the value of those contributions. Courts must be vigilant at all times and any attempt to do so must be struck down by the courts cl 19 in our view exemplifies such an attempt.

[16] Furthermore to accede to the respondent's interpretation, we will have a ludicrous situation as we have in David's case where his entitlement is now in the negative in the sum of RM7,297. One must not lose sight of the reasons why this scheme of 'retirement gratuity' was set up and that is to ensure employees remain loyal to the employers and they would be justly rewarded by their loyalty by staying with them. And if the respondent's contention had been properly explained to their employees, no one in their reasonable minds would accept such scheme or if there is such a scheme in place, no employee would stay employed with it for the long term as was done by the appellants here. As for the contention that our interpretation may discourage employers from having any retirement scheme for the benefits of employees, this with respect is neither here nor there. As to how employers induce loyalty from their employees, it is always a matter of policy left to the wisdom of the management. Whatever that policy may be, it cannot contravene the EPF Act.

[17] Finally as to the learned judge's view that cl 19 proviso is nothing but an arithmetical or accounting way of arriving at the retirement gratuity, we say that it may be so. But as pointed out by us above, it had the effect of dismantling the protection of employees enshrined in the EPF Act and as such cannot be condoned by the courts. We also agree with learned counsel for the appellants that the case of *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605 is distinguishable on the facts.

CONCLUSION

[18] For reasons stated above, we allowed the appeal with costs to the

appellants in the sum of RM20,000 for here and below. We also set aside the decision of the High Court and further order that the deposit to be refunded to the appellant.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor